Supreme Court, U.S.
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No. 96-1260

In The

Supreme Court of the United States

October Term, 1996

VERONICE A. HOLT,

Petitioner,

vs.

KMI-CONTINENTAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LISA J. DAMON
Counsel of Record
RINA M. MAYMAN
DAY, BERRY AND HOWARD
Attorneys for Respondent
260 Franklin Street
21st Floor
Boston, Massachusetts 02110
(617) 345-4600

CORPORATE DISCLOSURE STATEMENT

The following parents, affiliates or subsidiaries of respondent KMI Continental, Inc., f.k.a. The Continental Group, Inc. have issued shares of stock to the public:

- California Energy Company, Inc.
- C-TEC Corporation

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STATEMENT OF THE CASE

In this suit, Petitioner Veronice Holt, who enjoyed salary increases of 120% during her six-year tenure as a lawyer for Respondent, KMI-Continental, Inc., (hereinafter "Respondent") claims that she should have survived a motion for summary judgment despite having adduced no probative evidence that discrimination played any role in her salary and promotional history or subsequent termination. Petitioner believes that after more than 15 years of litigation, including three appeals to the Second Circuit, and two prior petitions to this Court — all of which have been unsuccessful — that she is right and everyone else is wrong.

Petitioner's principal contention is that she produced enough evidence to survive summary judgment; she did not. The District Court entered judgment, the Second Circuit affirmed and Holt filed this petition. There was no mistake below and no conflict in the circuits — nothing that merits the attention of this Court. Petitioner had to produce affirmative evidence of discrimination. She can not overcome summary judgment merely by saying the employer was wrong. Here, Petitioner provided little else. The Court of Appeals properly upheld the entry of summary judgment where it determined that no evidence of pretext had been proffered. *See* Pet. App. at 26. Moreover, nothing in its decision conflicts with this Court's rulings or that of any other circuit. Petitioner tries to make the Second Circuit out to be the lone rebel in a supposed refusal to accept the holding of *St. Mary's Honor Ctr. v. Hicks*; that is not the case. The Second Circuit has consistently and correctly applied *Hicks*. Even if this Court were to decide that the Second Circuit needed guidance on *Hicks*, this is not the case to provide such guidance. The Second Circuit never reached the *Hicks* analysis because it never had to. The Court found that Petitioner offered no evidence of pretext mandating trial. *See* Pet. App. at 26.

Petitioner's second contention is that both the District Court and the Court of Appeals erred when they found Petitioner's § 1981 claims time-barred. The courts below correctly determined that the state tolling statute, specifically the Connecticut "savings" statute, did not apply to Petitioner's complaint. Petitioner's § 1981 claims were properly dismissed.

NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

Despite her successful career with Respondent, on October 22, 1981, while still employed, Petitioner filed charges of race and sex discrimination with the Connecticut Commission on Human Rights and Opportunities ("CCHRO") alleging that Respondent had unlawfully denied her equality in promotions, pay, and other terms and conditions of employment. Less than two months later, while still employed at Respondent, Petitioner filed another charge with the CCHRO alleging that Respondent gave her a negative performance review (which rated her as "fully satisfactory,") and failed to adhere to a job description (which she had drafted) in retaliation for the earlier filed CCHRO action. Petitioner began to exhibit intolerably disruptive behavior and was orally warned and then terminated effective January 22, 1982. On February 3, 1982, Petitioner amended her last CCHRO charge, to include a claim of retaliatory discharge.

Preliminary Injunction

On February 16, 1982, approximately one month after her termination, Petitioner filed a complaint in Federal District Court, seeking a preliminary injunction to compel Respondent to reinstate her as Securities Counsel, the last position she held prior to her termination. Judge Robert Zampano heard the matter and, on April 15, 1982, ruled in favor of Respondent. *Holt v.*

KMI-Continental-KMI Group Inc., 542 F. Supp. 16, 17 (D. Conn. 1985).

Appeal To The Second Circuit

Petitioner appealed Judge Zampano's decision to the Second Circuit. On May 24, 1983, the Court reversed and remanded on the question of whether the circumstances of Petitioner's discharge either deterred other Respondent employees from asserting their own claims of discrimination or deterred potential witnesses for Petitioner from testifying on her behalf. *Holt v. KMI-Continental Group Inc.*, 708 F.2d 87, 90-91 (2d Cir. 1983).

Petition For Writ Of Certiorari

Petitioner then petitioned this Court for a writ of *certiorari* on the basis that the Second Circuit should have ordered her reinstatement. Respondent also sought review of whether an individual had standing to obtain an injunction against "chilling" on behalf of the government and other employees. Both petitions were denied. *Holt v. KMI-Continental Group Inc.*, 708 F.2d 87 (2d Cir. 1983), *cert. denied*, 465 U.S. 1030 (1984).

Remand To The District Court

On remand to the District Court, the case was transferred to Judge Ellen Bree Burns who heard testimony to determine whether there was a "chilling effect." Petitioner amended her Complaint to assert claims against the Governor of Connecticut and the CCHRO. Judgment for the government was entered on June 6, 1985. *Holt v. KMI-Continental Inc.*, 631 F. Supp. 653 (D. Conn. 1985), *aff'd*, 788 F.2d 3 (2d Cir.), *cert. denied*, 479 U.S. 839 (1986). On the same day, Judge Burns also entered a final judgment denying the preliminary injunction and dismissing the complaint. *Holt v. KMI-Continental Group Inc.*, No. 82-119 (D. Conn. June 6, 1985).

Appeal To The Second Circuit: Writ Of Certiorari

Petitioner filed a request for reconsideration which was denied and then appealed again to the Second Circuit. On January 30, 1986, the Second Circuit affirmed Judge Burns' ruling and Petitioner sought a writ of *certiorari* from this Court which was again denied. *Holt v. KMI-Continental Group, Inc.*, 788 F.2d 3 (2d Cir. 1986), *aff'd*, 631 F. Supp 653 (1985), *cert. denied*, 479 U.S. 839 (1986).

Dismissal Of The CCHRO Complaints

On June 13, 1985, the CCHRO dismissed Petitioner's first action for lack of sufficient evidence. Petitioner requested that the Equal Employment Opportunity Commission ("EEOC") review and reinvestigate the CCHRO findings and, on August 6, 1986, the EEOC issued a "no cause" finding. On February 27, 1986, the CCHRO dismissed Petitioner's second complaint for lack of sufficient evidence and Petitioner requested that the EEOC reinvestigate the findings of the CCHRO on March 30, 1986. On February 24, 1993, the EEOC affirmed the "no-cause" finding.

Summary Judgment Enters On The District Court Complaint

On August 8, 1986, Petitioner filed a 196 paragraph, four count complaint in the United States District Court, District of Connecticut. On April 5, 1993, the Petitioner filed a 177 paragraph, one count complaint alleging retaliation in pay and promotion and retaliatory discharge in the United States District Court, District of Connecticut. The United States District Court granted Respondent's motion to consolidate Petitioner's two complaints on September 14, 1993. On February 16, 1995, the District Court granted summary judgment to Respondent as to all counts of the consolidated complaint.

Appeal To The Second Circuit: Writ Of Certiorari

Petitioner appealed to the Second Circuit, which upheld the District Court ruling on September 4, 1996. *Holt v. KMI Continental Inc.*, 95 F.3d 123 (2d Cir. 1996). After her request for rehearing containing a suggestion for rehearing *en banc* was denied, Petitioner filed for a writ of *certiorari.*

STATEMENT OF UNCONTESTED FACTS

Petitioner, a practicing attorney who is representing herself *pro se* in this action, was an in-house attorney for Respondent from October, 1976 until her discharge, effective January 21, 1982. Petitioner joined the Legal Department of Continental Forest Industries ("CFI"), one of Respondent's subsidiaries, in October, 1976. Her starting salary was $26,000 per year, which was more than she had earned at Scott Paper, her prior employer.

Petitioner's promotion history while employed by Respondent was notably positive. In four years, Petitioner moved from a position as Assistant General Counsel at a subsidiary to a position as Securities Counsel in the Corporate Legal Department. Her salary doubled from $26,000 to $52,500. Her final salary in 1981 was $57,500, almost 120% more than her initial salary and above that of other white males with similar years of experience in the legal department. *See* Pet. App. 31-38.

In 1979, Petitioner moved to the Corporate Legal Department where she was appointed Corporate Counsel II, or senior attorney. Seven months later, Petitioner was offered her choice of two positions, either the second ranking legal position at Continental Diversified Industries ("CDI") or a specialized position in securities law in the Corporate Legal Department. Petitioner chose the latter and was named Securities Counsel in

November, 1980. By this time, Petitioner's salary leapt from $26,000 to $52,500, and she had been promoted from Assistant Group Counsel of a product company to Securities Counsel in Respondent's Corporate Legal Department, all in the short span of four years. *Id.*

A series of particularly disruptive events in January, 1982, forced Respondent to terminate Petitioner. In early January, Petitioner's superior received reports from two highranking Respondent executives who were Petitioner's clients regarding episodes where Petitioner had acted so unprofessionally and erratically that they refused to work with her again. In one of these episodes, Petitioner unilaterally "fired" Wilkie, Farr, the outside law firm hired by the General Counsel and "hired" another outside law firm without consulting her superiors. *See generally* Pet. App. at 14. At the same time, Petitioner's relationships with her peers and supervisors in the Corporate Legal Department had deteriorated to a point where it was difficult for them to continue working with her. Petitioner demanded that specific attorneys be assigned to work for her on certain projects, reflecting a fundamental misunderstanding of her position as one among equals in the department. She also began to berate her supervisor for subverting what Petitioner perceived as her "supervisory responsibilities." *See* Pet. App. at 37. Petitioner's intractability and insubordination resulted in her termination.

Petitioner Distorts The Facts

Petitioner recites a litany of facts in her petition, already thoroughly reviewed by the courts below. Petitioner does not dispute the facts themselves so much as she disputes the meaning of them. Pursuant to Rule 15, we call specific attention to the most egregious.[1]

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1. Petitioner's rambling, five page statement contains many fact (Cont'd)

(Cont'd)
mischaracterizations. We have tried to address most of these below:

Petitioner states that she was the only attorney that was ever summarily terminated without a written warning that her conduct subjected her to termination. *See* Pet. Brief at 11. In fact, Bermas, Petitioner's supervisor, called Petitioner to his office to discuss her accelerating disruptions of the Department. He informed her that her unprofessional behavior would not be tolerated. Bermas prepared a written warning but was not able to find Petitioner to deliver it. After Petitioner did not appear for work, Bermas terminated her employment. *See generally*, Pet. App. at 40.

Petitioner states that Respondent maintained a policy of hiring and promoting in its Legal Department based on sex and race. *See* Pet. Brief at 12. While Respondent vehemently denies ever limiting its applicant pool or its candidates for promotion by either race and gender, these "facts" as alleged by Petitioner are completely irrelevant and of no legal consequence to her claims. In actuality, the facts Petitioner alleges support Respondent's position that it did not discriminate against blacks and women. Petitioner acknowledges that Respondent interviewed and selected blacks and women for positions in the Legal Department — an argument directly contrary to her claims of discrimination.

Petitioner states that she presented evidence that Respondent intentionally violated equal employment opportunity laws as evidenced by other suits involving the Respondent. *See* Pet. Brief at 13. Petitioner's reference to these suits is emblematic of her ability to distort the facts as none of the named entities even employed the Petitioner. Moreover, the cases arose in circumstances so different as to have no relevance or probative value. Two of the cases involved the application of a settlement agreement, one involved a complaint of sexual harassment and the other involved seniority systems at a paper mill. *See* Brief of Defendant-Appellee, Docket No. 95-7497 at 27.

Finally, Petitioner states that she submitted a report authored by Respondent's Personnel Director which concluded that, from the viewpoint of African American employees, pay and promotions were not available on
(Cont'd)

1. *Salary.*

Petitioner states that at every point in her five year employment her salary was less than similarly situated white males. *See* Pet. Brief at 14. This is not just a mischaracterization — it is patently false. Despite two opportunities to do so, Petitioner has never rebutted Respondent's business documents which indicate that in 1980 and 1981 Petitioner made *more* than two white male attorneys with the same or more years of legal experience.[2] As to those attorneys who earned a greater salary, Respondent has offered ample unrebutted evidence that each lawyer to whom Petitioner compares herself had considerably more experience.[3] *See* Pet. App. at 21. These facts are not in "dispute" and Petitioner offers nothing to prove that this legitimate reason for the salary difference is pretextual. *Id.*

2. *The Management Incentive Plan* ("MIP").

Petitioner alleges that the Second Circuit "ignored Respondent's actual business records and admissions" in reviewing the fact that Petitioner, unlike prior lawyers in the

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an equal basis. *See* Pet. Brief at 14. In fact, in its opinion, the Second Circuit wrote that the report "resulted from a study in 1978 designed to assist the corporation in retaining black employees. Its indication of a belief that at that time blacks were undergraded and underpaid has little or no probative value on the issue of the corporation's motivation . . ." nor does it "demonstrate that [Respondent's] profferred non-discriminatory reason for modifying the MIP program was pretextual." *See* Pet. App. at 25.

2. In fact, Mr. Bailey and Mr. Cunnane, both white males in 1981 received respectively, approximately 7,000 and 11,000 dollars less than did Petitioner. *See* Brief of Defendant-Appellee, Docket No. 95-7497 at 14.

3. As the Second Circuit notes, each of the individuals compared had been out of law school substantially longer than Petitioner and their salaries were greater as a result. *See* Pet. App. at 21.

Legal Department, did not receive a Management Incentive Bonus ("MIP") when she achieved a grade of C-2. *See* Pet. Brief at 13-14. This is hyperbole. Far from ignoring this issue, the Second Circuit specifically addressed the MIP, devoting almost four pages of its decision to a careful analysis of Petitioner's claim, ultimately finding that Respondent changed the eligibility requirement for the MIP prior to Petitioner's eligibility and that this decision was uniformly applied, including the exclusion of another white attorney at Grade C-2. *See* Pet. App. at 21-25. To state that because the Second Circuit did not agree with Petitioner's conclusion, it "ignored" evidence is a gross mischaracterization.

3. *Retaliation.*

Petitioner denies that she engaged in the insubordinate conduct outlined in her January 20, 1982 termination letter. *See* Pet. Brief at 9-10. This is again a mischaracterization. Specifically, Petitioner states by submission of an affidavit, that she did not, in direct conflict with her supervisor's order, tell Wilkie, Farr & Gallagher to cease doing due diligence. *See* Pet. Brief at 9. But Petitioner does not and cannot deny that Wilkie, Farr called Petitioner's supervisor, Stephen Bermas, to say that Petitioner had directed the firm to discontinue the due diligence. Nor does she deny that a second law firm phoned Bermas to say that it had been retained by Petitioner to perform the due diligence. *See* Pet. Brief at 10. Taken in the best light, Petitioner is saying that she did not consider her own behavior to be insubordinate. This is not enough to satisfy her burden.

Similarly, Petitioner claims that she did not force Patricia Heck to relinquish the only word processor on which Heck was working to meet a deadline. *See* Pet. Brief at 10-11. But, Petitioner does not deny the incident occurred or that she engaged in the conduct. She merely concludes that she believes

the conduct was not disruptive and that she had a good reason for her conduct. *See* Pet. Brief at 10. While Petitioner may disagree with the assessment of her behavior, to deny that it occurred is another mischaracterization of the facts.

Finally, Petitioner claims that Respondent's assertion that she refused to discuss her work assignments and her treatment of others with Bermas on several occasions is countered by four memoranda written to Bermas. *See* Pet. Brief at 11. This is a blatant distortion. The memoranda Petitioner points to show a departure from a practice of collegiality and face-to-face resolution of workplace issues and an attempt to bypass her immediate supervisors.

In sum, there is no indication that the District Court or the Second Circuit failed to consider all the facts presented. Petitioner's own self-serving assertions about the meaning of her evidence do not support review by this Court.

REASONS FOR DENYING THE WRIT

Petitioner presents two questions in her petition for writ of certiorari. The first pertains to her claims based on Title VII and the second arising from her § 1981 claims. Neither question warrants review from this Court.

I.

THE SECOND CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT ON PETITIONER'S TITLE VII CLAIMS.

Petitioner's request for review rests on an amalgam of arguments. Honed to their essence, Petitioner believes: (1) that she submitted evidence of pretext which the lower courts

ignored; (2) that the Second Circuit misunderstood the summary judgment standard articulated in *Anderson v. Liberty Lobby*; (3) that under *Hicks* proof of pretext alone defeats summary judgment; and (4) that all the other Circuits except the Second (and perhaps the First) accept this proposition. *See* Pet. Brief at 22. The sum of Petitioner's contentions is that the courts below were wrong and she should have survived summary judgment.

However, the decisions below rest on a straightforward application of the summary judgment standard, articulated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), to an employment discrimination case. Applying the three-step burden shifting analysis enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), the lower courts determined that liability under Title VII could not be imposed absent evidence that Respondent treated Petitioner differently than others similarly situated or had a retaliatory motive in terminating her from her position. *See* Pet. App. at 1, 29. Both the District Court and the Second Circuit properly concluded that Petitioner provided insufficient evidence to support a reasonable inference that Respondent's proffered reasons for its employment actions were pretextual.[4] Here, where there is no circuit conflict nor a mistake by the Court of Appeals, further review is not warranted.

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4. The Court of Appeals never reached the issue of whether Respondent's legitimate business articulations were a pretext for *discrimination* under *Hicks*. Indeed, the Court of Appeals found that Petitioner merely *attempted* to show pretext "by asserting her personal belief that she was the most qualified person for [the promotions]." *See* Pet. App. at 10, 12. The Second Circuit found that Petitioner presented no evidence of pretext to show her termination was retaliatory, noting that Petitioner did not rebut that she received a raise after filing her first complaint with the CCHRO. *Id.*

A. THE DECISION BELOW IS CORRECT BECAUSE THE PETITIONER ADDUCED NO EVIDENCE OF PRETEXT.

Petitioner continually asserts that both the District Court and the Second Circuit wrongly decided this matter, ignoring "genuine issues of material fact." *See* Pet. Brief at 17-21. In so saying, Petitioner betrays a fundamental misunderstanding of what it means to have a genuine issue of material fact. Petitioner apparently believes that the mere proffer of her own opinion in a form permissible under Federal Rule of Civil Procedure 56(e) ends the inquiry — that summary judgment cannot enter for the employer. *See, e.g.*, Pet. Brief at 19. Here, the Court of Appeals properly required evidence beyond Petitioner's own self-serving assessment to rebut the legitimate business reasons for the actions taken.[5]

The Court of Appeals correctly applied the summary judgment standard. *See* Pet. App. at 9. A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986). Only the substantive law can determine which facts are material. *Id.*; *Gallo v. Prudential Residential Services.*, 22 F.3d 1219 (2d Cir. 1994). The substantive law, Title VII, requires a plaintiff to prove that the employer took the personnel action at issue "because of [plaintiffs] race, color, religion, sex or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1). This Court established an allocation of the burden of production and an order for the presentation of proof in discrimination cases. *McDonnell*

5. The Court of Appeals specifically noted that Petitioner's "attempts to show pretext by asserting her personal belief that she was the most qualified person for the various positions . . . were ineffective," concluding that "[h]er opinion is belied by the facts. . . ." *See* Pet. App. at 12.

Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). However, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated remains at all times with the plaintiff. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993).

Here, the Court of Appeals applied the correct standard to *McDonnell Douglas* and *Hicks* and reviewing all the evidence *de novo* concluded that Petitioner failed to show that Respondent's reasons were false. *See* Pet. App. at 11, 13, 14. Simply put, Petitioner failed to establish pretext. Unhappy with the result, Petitioner summarily concludes that the Court of Appeals ignored the standard articulated in *Anderson* — that it improperly provided a special standard under *Hicks* by abruptly ceasing its inquiry at the point Respondent articulated a legitimate business reason for its actions. *See* Pet. Brief at 20. This is not the case. Both the District Court and the Second Circuit sifted through facts finding that none rebutted Respondent's articulated business reasons. The summary judgment standard articulated by this Court was properly applied.

B. *ST. MARY'S HONOR CTR. V. HICKS* REQUIRES AFFIRMATIVE EVIDENCE OF DISCRIMINATION.

Equally erroneous is Petitioner's assertion that, under *Hicks*, pretext alone constitutes legally sufficient evidence of discrimination. *Hicks* teaches that "a reason cannot be proved to be a pretext for discrimination unless it is shown *both* that the reason was false and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-08 (1993). At summary judgment, the plaintiff must establish a genuine issue of material fact as to whether the employer's reason is false *and* as to whether it is more likely than not that a discriminatory reason motivated the employer to make the

adverse employment decision. *Gallo v. Prudential Residential Serv.*, 22 F.3d 1219, 1225 (2d Cir. 1994). *See also Woods v. Fuchon Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994); *Runnebaum v. Nationsbank of MD, N.A.*, 95 F.3d 1285, 1293 (4th Cir. 1996); *Grimes v. Texas Dept. of Mental Health*, 102 F.3d 137, 141 (5th Cir. 1996); *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996); *Nidds v. Schindler Elevator Corp.*, 104 F.3d 854, (9th Cir. 1996) *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 442-43 (11th Cir. 1996). In its decision, the Second Circuit correctly enunciated that once the defendant satisfied the burden of production — articulating a "legitimate, clear, specific and non-discriminatory reason for" the challenged action — the plaintiff has the ultimate burden to prove that the employer's reason was merely a pretext for discrimination. *See* Pet. App. at 10.

Petitioner would like this Court to grant certiorari based on her notion that the Court of Appeals misunderstood *Hicks*. *See* Pet. Brief at 20-22. Contrary to this claim, the Court of Appeals decision is fully in accord with *Hicks*. In *Hicks*, this Court held that "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Hicks*, at 514-515. If, as here, the employee cannot adduce evidence to support a finding that the employer lied, summary judgment may enter.

The Second Circuit found the employer's explanations for the employment actions it took to be legitimate. *See* Pet. App. 11, 14, 25. Petitioner believes the Court of Appeals finding is wrong. And so, the Petitioner grasps on to the one sentence in *Hicks* as support for a pretext only rule: "the fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of

mendacity) may, together with the elements of a prima facie case, suffice it to show intentional discrimination." *See* Pet. Brief at 21 (quoting *Hicks*, 113 S. Ct. at 2749.) But that sentence at best means only that where a prima facie case itself supplies the requisite affirmative evidence of discrimination, no additional evidence of discrimination is required *after* pretext has been demonstrated. Pretext alone is not enough. The " 'ultimate question [is] discrimination vel non.' " *Hicks*, 113 S. Ct. at 2753 (quoting *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983)).

Even if this Court agreed with Petitioner and ruled that her burden was only to rebut Respondent's stated reasons for its action, Petitioner failed to do even that. Thus, if we applied Petitioner's pretext-only rule, summary judgment would enter.

C. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

Petitioner urges review because the decision of the Second Circuit alone ostensibly conflicts with "the law in every other circuit". *See* Pet. Brief at 25. As an initial matter, half of the circuit court decisions upon which Petitioner relies in support of her claims are pre-*Hicks* decisions and can shed little to no light on to a "pretext" versus "pretext plus" discussion.[6] Of more

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6. Petitioner relies on pre-*Hicks* cases from the Third, Ninth and Eleventh Circuits. Post-Hicks, these same circuits have applied exactly the same analysis as articulated both in the Second Circuit and *Hicks*. *See Lattimore v. Polaroid Corp.*, 99 F.3d 456 (1st Cir. 1996) (holding that Title VII requires that, in addition to proving pretext, employee also must prove that the employer was motivated by a discriminatory purpose); *Nidds v. Schindler Elevators Corp.*, 103 F.3d 854 (9th Cir. 1996) (employee's age claim where plaintiff fails to establish employer's reasons for termination (Cont'd)

importance, the post-*Hicks* cases do nothing to repudiate that there must be affirmative evidence by a plaintiff presented "at some point in the *McDonnell Douglas* order of proof from which the fact finder can reasonably infer that the defendant intentionally discriminated against the plaintiff." *St. Mary's Honor Ctr v. Hicks*, 509 U.S. 502 (1993). Even Petitioner's cases hold that, as part of the prima facie case or as pretext-plus, there must be affirmative evidence from which a jury could rationally find that the plaintiff was a victim of intentional discrimination or retaliation. Contrary to Petitioner's assertion that her evidence was ignored, the Second Circuit carefully reviewed the information presented and found that Petitioner had failed to adduce such affirmative evidence. The conflict claimed by Petitioner is specious.

Additionally, the two post-Hicks cases cited to by Petitioner do not support a showing of conflict between the circuits. In *Kowalski v. LIF Prods.*, 82 F.3d 1283 (3d Cir. 1996), the Third Circuit addressed whether an employee was protected against retaliation under the scope of § 510 of the Employment Retirement Income & Security Act ("ERISA"). The Third Circuit reversed a grant of summary judgment in favor of the employer because the plaintiff raised: (1) a genuine issue of material fact that contradicted the employer's proffered explanation; *and* (2) evidence which could be used to show that the employer's specific intent was to violate ERISA. Kowalski's prima facie case was such that it raised affirmative evidence of retaliation. This is not in conflict with the *Holt* decisions below; Kowalski had evidence of discrimination, Petitioner did not.

(Cont'd)

constituted pretext for discrimination); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996) (holding that former employee in age claim failed to provide sufficient evidence to rebut employer's legitimate, non-discriminatory reason).

Similarly, in *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498 (5th Cir. 1994), plaintiffs claimed that they were discharged in retaliation for reporting incidents of sexual harassment. The Fifth Circuit properly identified the standard under *Hicks* — that the plaintiffs must prove that the legitimate reason articulated by the defendant was false and that the defendant's real reason for discharge was prohibited under Title VII. *Id.* at 275. The Fifth Circuit began the burden shifting analysis, then remanded the case to develop an analysis on the facts of causation, the third prong of the prima facie case. This is completely in line with the standard used by the Second Circuit in its analysis of Petitioner's claims and its finding that Petitioner had adduced no evidence of discrimination. Petitioner's own cases do not support any meaningful conflict among the circuits; her petition should be denied.

II.

THE SECOND CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S SECTION 1981 CLAIMS AS UNTIMELY.

Both the District Court and the Court of Appeals correctly found that Petitioner's § 1981 claims are time-barred, having arisen more than three years prior to the filing of the Complaint. In dismissing the § 1981 claims, both courts properly determined that the Connecticut "savings" statute, Conn. Gen. Stat. § 52-592 (1993), does not apply to Petitioner's Complaint. Petitioner's prior action for injunctive relief was dismissed squarely on the merits for failure to demonstrate irreparable injury necessary for injunctive relief, not for purely procedural reasons as required to save an action under the statute. *Legassey v. Shulansky*, 28 Conn. App. 653, 659, 611 A.2d 930, 933 (1992); *Masterson v. Atherton*, 328 F.2d 106, 108 (2d Cir. 1964); *see also Lacasse v. Burns*, 214 Conn. 464, 472, 572 A.2d 357, 361 (1990).

Further, since Connecticut procedural rules do not apply in federal court, Respondent's failure to cite specifically the borrowed statute of limitations in its answer does not preclude it from raising this defense.[7] Federal courts must apply a state limitations period to a federal civil rights action, including an action brought under § 1981. However, when borrowing state statutes of limitations for application to federal civil rights claims, federal courts borrow only what is necessary to fill gaps or deficiencies in federal law, and only so much of state tolling and application provisions as are integral and essential to a limitations scheme. *Lewellen v. Morley*, 875 F.2d 118, 121 (7th Cir. 1989). There is no deficiency in federal procedure that *Connecticut Practice Book* § 109A is needed to fill since Fed. R. Civ. P. 8(c) establishes requirements for the pleading of affirmative defenses, such as statutes of limitations.

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7. *Connecticut Practice Book* § 109A, requiring the identification of a statute relied upon in a special defense, is not a substantive prescription. *Rowe v. Godou*, 532 A.2d 978, 981 (Conn. App. 1987), *rev'd on other grounds*, 550 A.2d 1073 (Conn. 1988). Furthermore, compliance is desirable rather than mandatory. *See also Hanover Ins. Co. v. Fireman's Fund Ins. Co.*, 217 Conn. 340, 586 A.2d 567 (Conn. 1991). Pursuant to the notice pleading requirements of Fed. R. Civ. P. 8(c), petitioner was on notice when Respondent filed its Answer, that Respondent was asserting a statute of limitations defense.

CONCLUSION

The petition should be denied.

Respectfully submitted,

LISA J. DAMON
Counsel of Record
RINA M. MAYMAN
DAY, BERRY AND HOWARD
Attorneys for Respondent
260 Franklin Street
Boston, Massachusetts 02110
(617) 345-4600